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IN THE

Supreme Court of the United States

October Term, 1966
No. 708

SPINDLER REALTY CORPORATION, a corporation,
Petitioner and Appellant,

vs.

JOHN C. MONNING, as General Manager and Superintendent of Building and Safety of the City of Los Angeles,
Respondent and Appellee.

SPINDLER REALTY CORPORATION,
Plaintiff,

vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellant District, of the State of California.

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SPINDLER REALTY CORPORATION,
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vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellant District, of the State of California.

Petitioner, Spindler Realty Corporation, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, of the State of California entered in the above case on June 29, 1966 and modified on July 27, 1966.

Opinions Below.

The Amended Opinion of the District Court of Appeal, Second Appellate District, of the State of California is reported at 243 A.C.A. (Calif.) 260.

Jurisdiction.

The judgment of the District Court of Appeal, Second Appellate District, of the State of California was made and entered on June 29, 1966. On July 27, 1966, an Order was filed denying a Petition for Rehearing and modifying the Opinion filed on June 29, 1963. A Petition for Hearing in the Supreme Court of the State of California was denied on August 24, 1966. Copies of the Opinion and Order of the District Court of Appeal are annexed to this Petition as Appendix "A" and Appendix "B" respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

The questions presented are:

1. Whether, under the circumstances disclosed by this record, Petitioner acquired a *vested right to build* for R-5 (multiple housing) purposes, of which it cannot constitutionally (*i.e.*, under the 14th and 5th Amendments) be deprived.

2. Whether if, as found by the Trial Court, petitioner obtained a *"vested right to grade" an R-5* homesite, the City of Los Angeles can constitutionally prevent petitioner from *building* on it.

3. Whether a vested right to build is determined by considerations of fairness, equity and good faith, both on the part of the developer, and the City, or whether consideration of any of these factors is foreclosed by the absence of a building permit.[1]

4. Whether a City Ordinance which places petitioner's property in a zone in which

   (a) the number of dwelling units per acre authorized by that zoning cannot *physically* be created, on the property and

   (b) the density requirements (*i.e.*, the authorized number of dwelling units per acre) made applicable to petitioner's property are not applicable to any other property, in the City, in that zone

   is arbitrary and discriminatory.

5. Whether elemental principles of justice and morality can create an estoppel against the City.

Constitutional Provisions and Statutes Involved.

The pertinent portions of the Fourteenth and Fifth Amendments of the Constitution of the United States, of Sections 12.03, 12.12, 12.23c of the Los Angeles Municipal Code and of Los Angeles City Ordinances Nos. 121338 and 116389 are set forth in Appendix "D".

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[1]The same considerations would determine whether Petitioner has also a valid "non-conforming use" under the provisions of Section 12.23C of the Los Angeles Municipal Code. *County of San Diego v. McClurken*, 37 Cal. 2d 683, 691. In the interest of brevity, the point is not argued here but is exstensively discussed at p. 75 *et seq.* of the Petition for Hearing.

Statement.

The basic facts are not in dispute[2] and are summarized as follows:

After the petitioner had spent the sum of $522,541.55 to grade and otherwise develop its real property for multiple housing (Zone R-5) purposes, the City of Los Angeles re-zoned the property to limit its use to single family dwellings (Zone R-1H). Petitioner had been induced to make these expenditures by reason of a long series of City permits and like authorizations, including a *grading permit*. An application for a *building permit* was filed, together with building plans, before the enactment of the rezoning statute. As proceedings to rezone were pending, a building permit was never granted. The Trial Court found that petitioner had a "vested right" to complete the *grading* of the building site for an R-5 purpose. But the District Court held that, once graded, petitioner could not *build* on it for that purpose.

The real property consisted of 21.4 acres. It had been zoned initially R-5, on petitioner's application and had remained so zoned for thirteen years. This zoning permitted the development of the property for either hotel or apartment house purposes and, during this period, petitioner secured a dozen authorizations and per-

[2]They are included in Findings 1 to 41 of the Finding of Fact, which are printed for convenient reference in the Appendix to Appellant's Opening Brief, which has been certified to this Court. Also certified, in addition to the Reporter's Transcript [Rep. Tr.] and Clerk's Transcript [Cl. Tr.] are the Briefs of both parties, the Petitions for Hearing and Rehearing and the Exhibits referred to in this Petition. That the facts generally were found in favor of the Petitioner appears from the fact that for the purpose of arguing its Motion for a New and Different Judgment in the Trial Court [Clk. Tr. p. 190], petitioner did not ask that the facts, as found, be supplemented or changed in any way.

mits from the City to develop the property for multiple housing uses.[3]

On July 19, 1961, petitioner filed its grading plans, paid its fees, and applied for a grading permit. This was over three months before any proceedings were instituted by the City looking toward a possible rezoning of the property. On September 27, 1961 the City granted a grading permit and petitioner filed a $275,000.00 bond conditioned on the faithful performance of the conditions of the permit. On October 18, 1961 petitioner entered into a contract with a grading contractor which provided a total liability of $562,796.00 [Find. 15].

On October 26, 1961, during the progress of the grading, and without notice to petitioner, the City Planning Commission initiated action to rezone the property. At that time, the grading operations had reached a point where it would have been "highly dangerous" in the event of rainfall to have done nothing for the protection of property owners below the grading operations [Find. 21]. "Huge amounts" of fill had been deposited on the ground from previous grading operations and "huge amounts" had been loosened and much brush had been cleared (*Ibid.*). The Trial Court found that on that day, petitioner had "every reasonable hope and expectation" that the proposed zoning of the subject property from R-5 to R-1H would not eventually become the law and that petitioner's decision to proceed with the grading was an "entirely reasonable" one to make (*Ibid.*). Petitioner's good faith in proceeding with the grading after such notice is not questioned by the City.[4] Notwithstanding, the District

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[3]These are listed at page 8 *et seq.* of this Petition.

[4]See Respondent's Answer to Petition for Hearing in the Supreme Court page 14.

Court held that expenditures made by petitioner, after such notice, totaling $305,287.12 (Appendix "A" p. 6), were made at its own "risk" (Appendix "A" p. 11).

Petitioner continued to grade the property until the enactment of the rezoning statute. At that time, the property had been placed in a safe condition (by raising the fill to a point where water did not drain off on homesites below). The work was then stopped, with the job somewhat less than half completed. It has remained in the condition shown by Exhibit 32G (reproduced in Appendix "F") ever since.

The density (or number of dwelling units authorized) for property zoned R-1H was 2½ units per acre (Appendix *"E"*). The density authorized for petitioner's property was twice that, or 5 units per acre (*Ibid.*). As each dwelling unit in zone R-1H was required, by Ordinance, to contain a minimum of 15,000 square feet, five (5) dwelling units could not be constructed on petitioner's property. *No other property in the City with this authorized density, was placed in Zone R-1H.*

The statute was not a general zoning ordinance of broad application but was "spot" zoning applicable to petitioner's property only.[5]

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[5]The pertinent parts of the following City Ordinances are included in Appendix "D".

Ordinance 121,338 rezoning Petitioner's Property to R-1H;
Ordinance 116,389 creating zone R-1H;
Section 12.12 of the Los Angeles Municipal Code establishing zone R-5;
Section 12.23C of the Los Angeles Municipal Code protecting non-confroming uses;
Section 12.03 of the Los Angeles Municipal Code defining the expression "use".

Reasons for Granting the Writ.

1. It is clear from the Opinion of the District Court (Appendix "A" p. 8) that if petitioner had made the expenditures involved in this case in reliance on a *"building permit"*, instead of a *"grading permit"*, petitioner would have acquired a "vested right" (*ibid.*) of which it could not constitutionally be deprived.[6] Petitioner believes that the *grading* of a building site, on the scale here in question (involving the excavation and recompaction of over 1,000,000 cubic yards of earth), is an essential part of the building process and that a *grading permit* is an integral part of the City's *authorization* to build. Moreover, petitioner contends that a *vested right* to build is not determined by the mere absence, or existence, of a *building permit* but upon a consideration of *all* the many factors involved in this case, including the many representations made by the City, the reliance placed by petitioner thereon, and the detriment suffered in consequence thereof.

It is necessary, therefore, for the Court to look at the facts. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. Rep. 158, Mr. Justice Holmes said this was always necessary in this type of case. He pointed out that the police power has its constitutional limitations and that, when the government's power to *regulate* private property in the public interest is in issue, *"the question depends upon the particular facts."*[7] (67 L. Ed. p. 325). It is the *"extent*

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[6]See, also, the cases on which the District Court relies, *viz.*: *Trans-Oceanic Oil Corporation v. Santa Barbara*, 85 Cal. App. 2d 776, *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, and *County of San Diego v. McClurken*, 37 Cal. 2d 683.

[7]In the following cases in California, the courts have declared that every zoning case must be declared on its own facts: *Para-*

(This footnote is continued on the next page)

of the diminution of the private rights" that is important and determines whether *"the legislature has gone beyond its constitutional power."* (*Ibid.*). The issue is "a question of degree—and therefore cannot be disposed of by general propositions." (*Ibid.*, p. 326). And the learned Justice added the *caveat:*

> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."*[8] (*Ibid.*).

The same relative approach appears in two noteworthy cases in the Supreme Court of New Jersey,[9] both involving a change of zone after the builder's rights had vested. The New Jersey Supreme Court held that the issue is determinable by a "balance of the equities" involved.

If this Court will balance the equities here, it will find on petitioner's side of the scales the following:

i. That petitioner had a validly issued Grading Permit to construct a *building site in an R-5 zone* which, when the Permit was issued, permitted *the multiple housing* which petitioner proposed to erect.

ii. That, in addition to issuing a grading permit, the City issued to petitioner additional permits to grade

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mount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217, 228; *Edmonds v. County of Los Angeles,* 40 Cal. 2d 646, 651; *Livingston Rock etc. Co. v. County of Los Angeles,* 43 Cal. 2d 121, 126; *Beverly Oil Co. v. City of Los Angeles,* 10 Cal. 2d 552, 560.

[8]Emphasis here, and elsewhere in this Petition, unless otherwise noted, supplied.

[9]*Tremanco v. Garzio,* 32 N.J. 448; 161 A.T.L. 241; *Gruber v. Mayor and Township Committee of the Township of Raritan,* 39 N.J. 1; 186 A. 2d 489 (1962).

in an area other than a subdivision, to grade in the City's right-of-way and to extend the toe of the fill on the property onto adjacent land; that it approved petitioner's plans for temporary erosion control methods and devices in relation to the grading operations; and that each of these separate authorizations was given with full knowledge, on the part of the City *that the proposed use of the property was for the multi-housing projects contemplated by the then R-5 zoning* [Finds. 7-13].

iii. That the City had initially granted the R-5 zoning to petitioner expressly for the purpose of enabling petitioner to commence *R-5 construction,* which it thought would be in "the public interest," would provide "facilities which would be of local as well as general benefit to the community" and "would not be in conflict with any of the objectives of the Master Plan." [Find. 7].

iv. That in "reliance on said R-5 zoning and said Grading Permit and other administrative acts herein set forth and in good faith" [Find. 15], petitioner had entered into a grading contract with the contractor for the removal of over 1,000,000 cubic yards of earth, for the construction of 47,710 square feet of asphalt concrete paving terraces, for the installation of 1,786 linear feet of corrugated metal pipe, all for a total contract price of $526,796.00 (*Ibid.*).

v. That pursuant to that grading contract, petitioner, before the enactment of the rezoning ordinance, had actually removed and recompacted 424,000 cubic yards of earth, 11,000 cubic yards of granite ditches and over 2,200 linear feet of sub and slope drains [Find. 32].

vi. That the total costs expended by petitioner "for the purpose of developing the subject property" was the sum of $522,541.55 [Find. 29].

vii. That while petitioner was advised, at the end of October, 1961, that the Planning Commission proposed to institute proceedings to rezone its property, petitioner had already, pursuant to its grading permit, denuded the hillside of brush, undercut "huge quantities of fill," created additional quantities of fill through the construction of haul roads and that on October 27, 1961 the situation, so far as adjacent property owners were concerned, was "highly dangerous in the event of rainfall." That in these circumstances petitioner's decision on October 27, 1961 to proceed with the grading was "an entirely reasonable one to make." [Find. 21].

viii. That by proceeding with the grading to a date shortly preceding the date of the enactment of the rezoning Ordinance (April 15, 1962), petitioner at a cost of $305,287.12 (Appendix "A" p. 6) was able to construct benches and raise the level of the fill to the point where the water was channelled out of the area and into canyons where no danger to adjacent property owners was involved. [Rep. Tr. p. 865 *et seq.*]

ix. That on June 15, 1960 the City rezoned all property adjacent to petitioner's property to zone R-1H but left petitioner's property zoned R-5, and that *since that date* petitioner spent over $305,287.12 to develop its property for *R-5 purposes.*

x. That prior to the commencement of its grading operations, petitioner had gone to William E. Milburn, the City's Superintendent of Grading, and the City's senior officer in charge of grading operations, and

pointed out that the precise location of its structures on the property had not yet been determined; that petitioner was thereupon advised by the Superintendent that "he saw no reason why (petitioner) could not proceed with (its) project *since it was already zoned R-5.*" [Rep. Tr. p. 161, lines 3-13, quoted in Petition for Hearing p. 31].

xi. That the highest and best use of petitioner's property was for R-5 development. That for R-5 purposes the land was worth between $210,000.00 and $273,000.00 but that for R-5 purposes it was worth $1,200,000.00 or about five times as much [Find. 37].

xii. That prior to the effective date of the Ordinance, petitioner had on file a valid application for a building permit and building plans, showing the precise nature and location of the buildings to be erected thereon, all in accordance with the zoning *on that date, i.e.,* March 27, 1962, in force. That these plans were sufficient to erect the buildings shown thereon and that, except for this zoning ordinance, a building permit would have been issued to petitioner on June 2, 1962 [Find. 24], which date was well within the customary period taken by the Department of Building and Safety to examine and check building plans of this complexity [Finds. 23, 24; Rep. Tr. p. 1445, line 11 *et seq.*].

xiii. That the purpose of the grading authorized by the Grading Permit was the creation (by means of enormous cuts and fills) of a large level building pad which was not suitable for single family residences. That to complete the half-finished grading for R-1H uses would serve no purpose, for petitioner could not possibly move 1,000,000 cubic yards of earth and expect to sell R-1H

homesites at a profit [Rep. Tr. p. 514 *et seq.* and see the testimony excerpted at p. 66 *et seq.* of Pet. for Hear.]. That the City's only witness in this respect, Karl Gurston, the City Planner, agreed that the creation of hillside terracing was the only feasible grading for R-1H purposes [Rep. Tr. p. 2114, lines 4-10].

What then are the equities to be placed on the City's side of the scales? If we turn to the conclusions of the Court below, denominated "findings," it appears (para. 45) that the change of zone was "consistent and compatible with" the R-1H zone, in which adjacent property had been placed; that it was "rationally connected" with maintaining "limited density" of development for the entire area; that it would permit "completion and effectuation of the Santa Monica Master Plan" and that it would "*further* overburden the already inadequate public facilities including public streets and highways." That is all. Of course, the District Court was not bound by these conclusions[10] nor is this Court. So their validity may be examined.

In the first place, the Santa Monica Master Plan established, for petitioner's property, *twice* the density fixed for all other lots in the same R-1H zone: *i.e.*, 5 dwelling units per acre for this property as against 2½ units for other lots in zone R-1H [Map 11, Ex. EEE; App. "E"].

Secondly, the number of dwelling units authorized for this property by the Master Plan, *i.e.*, five (5) units per acre, could not possibly be constructed on an acre of R-1H property. For the minimum area of an R-1H

[10] *Hammer v. Town of Ross* (1963), 59 Cal. 2d 776. In Finding 39, the Trial Court found the actual reasons why the City acted, none of which has anything to do with these conclusions.

homesite, fixed by statute was 15,000 square feet [Find. 17]. As this Court is aware, an acre contains 43,560 square feet and less than *three* (3) 15,000 square feet dwelling units can be placed on an acre of R-1H property!

Thirdly, the treatment accorded petitioner's property is *sui generis* and a comparable situation does not, and could not, exist in the City of Los Angeles. For it cannot be assumed that the City elsewhere, or otherwise, authorized for R-1H property, anywhere in the City, the construction of an *impossible* number of dwelling units. This is the "invidious discrimination" of which Mr. Justice Douglas speaks in *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80, 85.

Fourthly, the testimony relating to the "further overburdening" of public roads was limited to that portion of Mulholland Drive between *Coldwater Canyon Drive and Coldwater Canyon Avenue*. It was already overburdened. The only independent and qualified expert called in the case testified that the increase of traffic resulting from this development would be "minor" [Clk. Tr. p. 1246, line 7, to p. 1247, line 6; see Appx. to App. Op. Br. p. 71]. Moreover, zoning looks to the future. And even if the street were overburdened, then, as the City urged in *Robinson v. City of Los Angeles,* 146 Cal. App. 2d 810 (and as the Court in that case held), adequate municipal facilities would, in due course, be supplied.[10a]

[10a] The testimony of the expert witnesses is set forth extensively between pages 40-76 of the Appendix to Appellant's Opening Brief. The suggestion in the Opinion of the District Court that specific findings were not requested, in connection therewith, is factually in error. (See Petition for Hearing p. 49 *et seq.*)

We submit that this is the way in which the equities of this case should be considered. By balancing what is secured for the City by what is taken away from petitioner, this Court can reach a decision which will satisfy a proper sense of justice. The Trial Court was sensitive of the calamitous consequences attendant upon this rezoning [Clk. Tr. p. 2686-A]. The District Court was not. It may be explained, possibly, by the fact that the Trial Judge saw and heard the witnesses and had the opportunity of going on the site and viewing the tremendous fills and the vast areas of unfinished excavation. (Appendix "F".)

2. We do not have here the case of a general zoning ordinance of broad and general application. We have "spot" zoning applicable, as in the case of *Pennsylvania Coal Co. v. Mahon, supra,* to a particular piece of property. In *Mahon* Mr. Justice Holmes felt that both a "public interest" and "exigency" were involved and that the "greatest weight should be given to the judgment of the legislature". But, these considerations did not, in his judgment, warrant "shifting the damages" to the single owner of the property. He said "the question at bottom is upon whom the loss of the changes desired shall fall" (p. 326).

3. It is the rule that where a general zoning ordinance is under consideration, a property holder is not permitted, during the interim, to acquire vested rights which will defeat the entire classification scheme. But that is not our case. Here, the rezoning affected petitioner's property only. In this case, it was "reasonable" and not "morally reprehensible" for petitioner to proceed. Petitioner proceeded because of the "highly dangerous" situation which confronted its neighbors and be-

cause its "hope and expectation" that the Ordinance would never become law was "reasonable". Its good faith was never questioned and good faith is the determinative criterion of where the risk lies. *Township of Lower Merion et al. v. Frankel,* 64 Montg. Co. L. R. (Pa.) 14, 358 Pa. 430; *Rex v. Borough of Landsdale,* 68 Montg. Co. L. R. (Pa.) 186; *American Veterans Housing Co-operative, Inc. v. Zoning Board of Adjustment,* 60 D. & C. (Pa.) 449.[11] In the Opinion of the District Court, petitioner's good faith is ignored.

4. This decision poses, directly, an issue of great importance to builders generally, and to banks and lending institutions in California. The question is: what reliance can be placed on zoning laws, and permits issued under them, at the local level? What the District Court has said, is that pre-*building permit* activities, no matter what municipal authorizations have been secured, or what expenditures have been made under them, or what changes of position have taken place, can never create a vested right to build. But this is not the rule in other states (Pennsylvania, New York, Illinois, and Michigan),[12] and the enunciation of any such doctrine could impede the progress of future real estate development throughout the State. By way of illustration,

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[11]These three cases are excerpted and discussed in Appellant's Petition for Hearing, page 45 *et seq.*

[12]In the following cases injunctive, or like, relief was afforded the landowner, or builder, for expenditures in advance of the issuance of a building permit, or where no building permit was issued, at all: *Herskovits v. Irwin,* 299 Pa. 155; *People v. Village of Morton Grove,* 17 Ill. 2d 183; *Fifteen Fifty No. State Bldg. Corp. v. City of Chicago,* 15 Ill. 2d 408; *Township of Lower Merion et al. v. Frankel,* 64 Montg. Col. L. R. (Pa.) 14, 358 Pa. 430; *Rex v. Borough of Landsdale,* 68 Montg. Co. L. R. (Pa.) 186; *American Veterans Housing Cooperative, Inc. v. Zoning Board of Adjustment,* 60 D. & C. 449; *In the Matter of Glenel Realty Corp. v. Carroll M. Worthington, as Building In-*

(This footnote is continued on the next page)

there is, in the City of Los Angeles, an extraordinary development called Century City. Millions of dollars have been spent in extensive *grading of* multiple housing and commercial sites. It is not presently known what type of building (authorized by the zone) will go on any particular building site. Hence in most cases, applications for building permits have not been filed. It is inconceivable that, at this stage, the City can be permitted to change the zone to R-1H, although no building permits have been applied for or issued. Even the City's Principal Planner, Ourston, said that any such action would be "quite unfair" [Rep. Tr. p. 2176, line 11, to p. 2177, line 11]. We believe that in this emerging field, guide lines from this Court are urgently required.

5. It is hardly debatable that governments should exhibit even more scrupulous regard for justice and higher morality than is required of individuals. And this Court has shown mounting exasperation with the claim that Government agencies are immune from equitable claims of this character. Mr. Justice Jackson in *Merrill v. Federal Crop Insurance Corporation,* 332 U.S. 380 insists that a government agency should be held to "the same fundamental principles of fair dealing that progressive states apply to private companies."[13] Nevertheless, the District Court betrays no

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spector of the Town of Greenburg, 4 App. Div. (N.Y.) 2d 706; *Ohlau v. Kleinert,* 201 N.Y.S. 83; *City of Little Falls v. Fisk,* 24 N.Y.S. 2d 460; *Rosenberg v. Village of Whitefish Bay, et al.,* 225 N.W. 838; *Cos Corp. v. Evanston* (Ill.), 190 N.E. 2d 346.

All these cases are discussed in Appell. Op. Br. p. 41 *et seq.* Mr. E. C. Yokely in his book, "Zoning Law and Practice", 3rd Ed. Vol. 1, p. 409, states that the rule of these cases is in accordance with the modern trend.

[13]For California cases to the same effect, see *Farrell v. County of Placer,* 23 Cal. 2d 629 and *City of Fontana v. Atkinson,* 212 Cal. App. 2d 499.

concern over the enormous losses sustained by petitioner or the extraordinary option offered petitioner at this stage, *viz.*: either (a) to abandon the property entirely, or (b) to expend an aggregate sum of over $1,000,000.00 to complete the job,[14] and have, in the end, a site which is unsuited for R-1H homesites and which would offer no possibility of recoupment.[15]

Conclusion.

For the reasons set forth above it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

BARRY BRANNEN,
Counsel for Petitioner.

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[14]The figures are analyzed at pages 18 and 19 of App. Reply Brief.

[15]The testimony is excerpted at page 18 *et seq.* of Petition for Hearing.